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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1995

HARRY D.THOMAS, Petitioner,

vs.

LAWRENCE WHALEN and

EDWARD AMMANN, Respondents.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Can a police officer's First Amendment right to speak out publicly on matters of public concern be restricted by administrative actions by superior officers intended to prevent identification of the police officer as a police officer, where that identification provides useful and pertinent information to the public?

2. In an action under 42 U.S.C. 1983, is qualified immunity available to police executives who take administrative actions against a police officer to prohibit the officer from making truthful statements about his employment during otherwise protected speech, where the purpose of the administrative actions is to diminish the credibility of the police officer in the public arena?

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No.

IN THE SUPREME COURT

OF THE UNITED STATES

OF AMERICA

OCTOBER TERM, 1995

HARRY D. THOMAS, Petitioner,

vs.

LAWRENCE WHALEN and

EDWARD AMMANN, Respondents.

PETITION FOR WRIT

OF CERTIORARI TO

THE UNITED STATES COURT

OF APPEALS FOR

THE SIXTH CIRCUIT

Petitioner, Harry D. Thomas,

respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit reversing the ruling of the District Court, granting Defendants' Motion for Summary Judgment on the basis of qualified immunity, and dismissing this civil rights action filed under 42 U.S.C. 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Thomas v. Whalen, et al., and appears as Appendix A to this Petition. The unpublished written opinion of the District Court for the Southern District of Ohio appears as Appendix B to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on April 21, 1995. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1). The District Court had jurisdiction under 28 U.S.C. 1331 and 1343(3) and (4).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I to the United States Constitution is set forth in Appendix C to this Petition.

Title 42 U.S.C. Sec. 1983 is set forth in Appendix D to this Petition.

STATEMENT OF THE CASE

Plaintiff's Complaint, Amended Complaint and Supplemental Complaint set out an action for damages and declaratory and injunctive relief, under 42 U.S.C. Sec. 1983, arising out of Defendants' organized and concerted efforts to use the disciplinary procedures and the command structure within the Cincinnati Division of Police to harass Plaintiff in an attempt to chill the exercise by Plaintiff of Plaintiff's First Amendment rights to speak out on public issues. The pleadings also set out an action under Ohio law for the intentional infliction of emotional distress arising out of the same actions. Plaintiff alleged that the efforts by Defendants to harass Plaintiff and to chill Plaintiff's exercise of his free speech have included, among other things,

the filing of false disciplinary charges against Plaintiff, the transfer of Plaintiff to particular duty assignments and the denial of requested transfers, the issuance of special orders applying only to Plaintiff limiting or infringing Plaintiff's free speech rights, the use of the efficiency rating procedure to complain directly about Plaintiff's positions on national issues, and the denial to Plaintiff of emergency assistance and support in life-threatening situations during Plaintiff's performance of his duties as a police lieutenant.

Plaintiff's pleadings further indicated that Plaintiff's exercise of First Amendment rights has included attending rallies in cities other than Cincinnati, appearing at press conferences in Washington, D.C., writing an article for a nationally-distributed magazine,

testifying in court under subpoena, and expressing his opinions on private citizen personal safety at a neighborhood town-meeting in Cincinnati. Plaintiff alleged that in no instance did Plaintiff attempt to speak for the Cincinnati Division of Police; rather, in every instance Plaintiff disclaimed any purpose other than to speak his own personal views, and specifically stated that his views were not those of the Cincinnati Division of Police. Plaintiff further alleged that in no instance did Plaintiff's spoken or written words specifically call into question the operation or administration of the Cincinnati Division of Police or make specific personal attacks on any member of the Cincinnati Division of Police. Plaintiff's exercise of First Amendment rights occurred in the context of Plaintiff's firmly held personal belief

that additional gun control laws are unnecessary, whether at the national, state, or local level, and in the further context of the nationwide debate over gun control issues in general and the "Brady Bill" in particular, legislation which was pending in the United States Congress during the entire period involved in the present lawsuit.

Defendants denied the allegations. On April 27, 1993, after the depositions of Plaintiff and the two individual Defendants were taken, Defendants filed a Motion for Summary Judgment, to which Plaintiff responded by filing a Memorandum in Opposition, with supporting affidavits attached. The District Court decided the summary judgment motion, without a hearing, by written decision, filed September 23, 1993, which granted summary judgment as to Defendant City of

Cincinnati, but denied the motion with respect to the individual Defendants Whalen and Ammann, holding that Whalen and Ammann were not entitled to summary judgment. Defendant Whalen and Ammann appealed this denial of qualified immunity and the resultant denial of the summary judgment motion to the United States Court of Appeals for the Sixth Circuit. Plaintiff did not appeal the summary judgment granted to the City of Cincinnati.

On April 21, 1995, the Sixth Circuit Court of Appeals reversed the decision of the District Court and dismissed the case, holding that Defendants Whalen and Ammann were entitled to qualified immunity because the actions of Defendants with respect to Plaintiff were reasonable administrative actions, and that therefore the Defendants did not violate a "clearly

established right" of Plaintiff. Plaintiff now files his Petition for Writ of Certiorari with the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this matter because the decision of the Court of Appeals offends the most deeply cherished of the fundamental individual liberties which make our nation what it is, the right to speak out freely on matters of national political concern. The decision below establishes a completely new and ill-founded exception to First Amendment principles, which should not be allowed to stand. To the extent that the opinion below allows government officials to prevent the publication of accurate facts concerning the experience and background of a public employee who wishes to speak out on matters of national concern, where the purpose of the government officials in

preventing such publication is to lessen the public credibility of the speaker, the opinion below allows government officials to control the terms of public debate. This cannot be allowed, and the United States Supreme Court should accept jurisdiction over this case in order to say so. This case is therefore one in which the supervisory powers of this Court should be exercised to correct the erroneous opinion of the Court of Appeals.

The principles governing motions for summary judgment in civil rights actions under 42 U.S.C. 1983 are clearly stated, if not always clearly applied. Rule 56 of the Federal Rules of Civil Procedure allows summary judgment to be granted only where there is no genuine issue of material fact and where the moving party is entitled to the relief requested. The party opposing a properly supported motion

for summary judgment may not rest upon mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in the non-movant's favor. The function of the court in determining the motion for summary judgment is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial, meaning whether there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

While the question whether any particular speech of a public employee-plaintiff is protected is a matter of law, Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); Connick v Myers, 461 U.S. 138, 103 S.Ct. 1685, 75 L.Ed.2d 708 (1983); the motivation behind any disciplinary action is a question of fact. Langford v. Lane, 921 F.2d 677 (6th Cir., 1991). A public employee in a command-oriented agency of local government, such as a police officer, is not relegated to a watered-down version of constitutional rights simply by virtue of such employment. Garrity v. New Jersey, 385 U.S. 493, 500, 87 S.Ct.616, 17 L.Ed.2d 562, (1967).

The decision of the trial court denying summary judgment correctly applied a two-prong test to determine whether Plaintiff Thomas's speech was protected as

a matter of law: First, were his remarks of "public concern," and second, if they were, were Plaintiff Thomas's interests in engaging in free speech outweighed by the interests of Defendants Whalen and Ammann in the effective administration of the Cincinnati Division of Police. Both prongs of this test are strongly based in federal judicial precedent. Meyers v. City of Cincinnati, 934 F.2d 726 (6th Cir., 1991).

The "public concern" prong is based in Rankin v. McPherson, 483 U.S. 378 (1987), where the Supreme Court held that a civil servant's remarks concerning the assassination attempt on President Reagan were a matter of public concern. While the content of the remarks was most controversial, the Court held that the remarks were nevertheless public political speech embodying a private citizen's

opinions concerning a sitting President. Other Supreme Court cases have maintained a distinction between speech on matters of "public concern", which is protected, and internal complaints about one's own job, or relations with one's superiors, which is not protected. Connick v. Myers, 461 U.S. 138 (1983). In the present case, the District Court correctly found that the only speech involved was speaking and writing in public forums concerning "gun control" issues. Plaintiff made no complaints about his job or the relations with his superiors. The District Court determined that ". . . there is no doubt that the Plaintiff's speech, both the essay and his attendance at the public rallies, addressed a matter of public concern. The issue of gun control was at the time of the events complained of, and still is, one of strong and sometimes

heated national debate." Clearly the first prong of the test to determine that Plaintiff's speech was protected is met, and the District Court was correct in so holding.

In order to justify restrictions on a public employee's speech on a matter of public concern, the speech must be of such a nature that it "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." Rankin v. McPherson, op. cit. Defendants should have been required to bear the burden of establishing these predicates, but the opinion below completely dissolved this burden, to the detriment of political free speech by

public employees. In both Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, (1968), and Ratliff v. Wellington Exempted School Board of Education, 820 F.2d 792 (6th Cir., 1987), teachers' remarks critical of school board policy and financing were held to be matters of public concern and were constitutionally protected, there having been no showing that a governmental interest outweighed the free speech rights of the teachers. The right of a fire captain to free speech with respect to equal opportunity matters was determined in Meyers v. City of City of Cincinnati, 934 F.2d 726 (6th Cir. 1991), where no governmental interest of the requisite type could be shown. The rights of subordinate police officers to exercise free speech with respect to the hiring of females and minorities by the police

department by whom that plaintiff was employed, as compared to the rights of police officials in the effective administration of police departments, are also well-established. Matulin v. Village of Lodi, 862 F.2d 609 (6th Cir. 1988). In the present case, the District Court correctly found that the Defendants "presented no actual evidence with regard to the factors set forth in Pickering." For example, when Defendant Ammann was asked under oath whether there was any reason that Ammann had imposed restrictions upon Plaintiff concerning Plaintiff's identification of himself as a Cincinnati Police officer, other than Ammann's attempt to reduce Plaintiff's credibility in discussing gun control issues, Defendant Ammann replied that there was not. (Ammann Deposition, May 6, 1992, page 23.) Neither Defendant Ammann

nor Defendant Whalen, Assistant Chief of Police and Chief of Police, respectively during the period of time concerned in the present suit, were able, when asked directly, to detail any departmental or governmental interest of the type required.

The opinion below grotesquely distorts the concept of a "clearly established right" in granting qualified immunity under Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), to Defendants in this case. When the Court of Appeals concluded that, " . . . although Thomas may not be required to conceal his employment as a police officer, his right to speak as a member of the Cincinnati Police Division is not clearly established, when evaluated under the balancing test set out in Rankin v. McPherson, op. cit. The extra margin of

credibility lent his cause by exploiting his affiliation does not outweigh the Cincinnati Police Division's interest in preserving the appearance of impartiality in areas closely related to its core mission," (Sixth Circuit opinion, at 13-14), that Court entirely and completely ignored the evidence present in the case, that, at every opportunity, Plaintiff Thomas expressly denied any intention to speak for the Cincinnati Division of Police. Yet, in the face of this uncontroverted evidence, the Sixth Circuit decided that, "In this case, however, Thomas was advertising and invoking his experience not just as a police officer, but as a highly ranked member of the Cincinnati Police Division, in a manner that entangled the Division in a matter of national controversy." (Sixth Circuit opinion, p. 13)

This attempted justification of a First Amendment restriction flies directly in the face of First Amendment precedent. It is a basic principle of the right of free speech and press that the right of a speaker to convey information and ideas equally implies the right to receive information and ideas by the public. Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 1032 S.Ct 2799, 73 L.Ed.2d 435 (1982); Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). The First Amendment presumes that some accurate information is better than no information at all, Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). This is of special importance in the context of an ongoing public debate over matters of

public concern and public policy since, "Just so far as . . . the citizens who are to decide an issue are denied acquaintance with information or opinion of doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good." **Board of Education v. Pico**, op. cit., footnote 20, citing A. Meiklejohn, Free Speech and its relation to Self Government. This situation becomes particularly pointed when it is understood that the actions of Defendants have not been neutral with respect to the gun control debate. Defendant Whalen holds views opposed to those of Plaintiff Thomas, and has been a public spokesman for those views, yet he seeks to restrict the credibility of Plaintiff Thomas when Thomas expresses his views. Plaintiff Thomas submits that it would take an

overwhelming governmental interest, indeed, for a restriction on the publication of truthful information material to an assessment of the credibility of a speaker to be upheld. In extreme contrast to the First Amendment principles outlined above, the court below characterized this effort to convey truthful information as an effort, "to exploit one's rank in public employment solely for the purpose of enhancing credibility for personal or political gain -- in effect, to use the fact of public employment as a 'soap box' from which the employee can advocate a political position on an issue of public debate." (Sixth Circuit Opinion, p. 12) It should be clear that there is absolutely no legitimate governmental interest involved in the attempt to muzzle Plaintiff Thomas. In the face of the evidence in the present

case, the attempt by the court below to justify the restrictions on Plaintiff Thomas's rights to convey accurate facts as "an attempt to preserve the appearance of impartiality" must be seen as a specious rationalization of a political philosophy at odds with cherished notions of individual liberty.

With respect to the facts of this case, Plaintiff Thomas submits that the following items are clear: First, this is a case where a police officer was speaking on matters of public concern; second, the police officer did not attempt to criticize persons or policies of his own department; third, the activities involved here, whether speaking or writing, occurred primarily in locations distant from the City of Cincinnati itself; fourth, the Defendants have been able to assert no legitimate governmental

interests in preventing the speech of Plaintiff Thomas; fifth, the information which the Defendants sought to prohibit was accurate and material to the public perception of the credibility of Plaintiff Thomas to speak on matters concerning gun control legislation; and finally, the activities by Defendants have been ongoing, have been directed toward stopping the speech of Plaintiff, and can fairly be seen as intentional, concerted activity intended to interfere with not only Plaintiff's First Amendment rights, but also to interfere with the ability of the public to obtain truthful information to allow the public to make informed decisions on matters of public concern. The courts of the United States should not dignify this attempt; rather, this Court should reject such governmental interference with vigorous and

untrammelled political debate.

CONCLUSION

Because it is unquestioned that there are numerous disputed material facts alleged, because the restricted speech involved was clearly of public concern, because no legitimate governmental interest was shown by Defendants in restricting the speech of Plaintiff, and because the right of Plaintiff to speak on issues of public concern has been well established under applicable case law, the Court of Appeals erroneously granted qualified immunity to Defendants. In so erring, the Court of Appeals created new and constitutionally unjustified restrictions on the speech of police

officers and other public employees. That decision should be reversed and the decision of the trial court denying summary judgment should be reinstated. For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Respectfully submitted,

_____

MICHAEL HOHN

Attorney for Petitioner

APPENDIX

APPENDIX A

No. 93-4129

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HARRY D. THOMAS,
Plaintiff-Appellee,

v.

LAWRENCE WHALEN and
EDWARD AMMANN,
Defendants-Appellants,

CITY OF CINCINNATI,
Defendant.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed April 21, 1995

Before: KEITH, WELLFORD, and DAUGHTREY, Circuit Judges.

MARTHA CRAIG DAUGHTREY, Circuit Judge. This case stems from disciplinary action taken by police department officials against a Cincinnati Police Division officer who made several unauthorized public presentations

-- both oral and written -- on behalf of the National Rifle Association, while wearing official insignia and identifying himself as a Cincinnati Police lieutenant. Alleging harassment and retaliation for the exercise of his free speech rights, the lieutenant, Harry D. Thomas, brought a civil rights action under 42 U.S.C. § 1983 against his supervisors, Chief of Police Lawrence E. Whalen and Assistant Chief of Police Edward Ammann, as well as the City of Cincinnati. In response to the defendants' motion for summary judgment, the district court dismissed the complaint against the City but denied summary judgment to Chief Whalen and Assistant Chief Ammann. They have appealed the district court's order.

Because we find that the defendants took reasonable administrative action to preclude Lt. Thomas from exploiting his uniform and his position in the police department, while continuing to honor his First Amendment right to debate the propriety of gun control legislation, we conclude that the defendants did not violate a "clearly established right" belonging to the plaintiff. It follows that the two individual defendants were entitled to qualified immunity from suit and that the complaint against them should likewise have been dismissed. We, therefore, reverse the judgment of the district court.

I.

Lt. Harry Thomas is an outspoken opponent of gun control laws and an active member of the National Rifle Association. On September 7, 1988, Thomas attended a rally in Washington, D.C., sponsored by the NRA to protest the Brady Bill. During the rally, Thomas appeared at a press conference and later spoke to various elected officials. He was dressed in civilian clothes, but verbally identified himself as a police officer.

Thomas alleged that after he returned from Washington, he had a conversation on September 18, 1988, with Assistant Chief Ammann, who at that time supervised the police bureau to which Thomas was assigned. According to Thomas, Ammann told Thomas that he was not a team

player, could not expect to receive any support from the administration of the Police Division and was ruining his career by his opposition to gun control measures. Allegedly, Ammann also told Thomas that he was to be transferred and that he would not be informed of the reasons for the transfer. That day, Thomas said, he was transferred from District 3 to District 2. According to Whalen and Ammann, however, Thomas was actually transferred on September 14, 1988, along with ten other lieutenants, as part of a standard rotation.

On June 6, 1989, Thomas attended a second NRA-sponsored rally in Washington. He again spoke to media representatives and again was dressed in civilian attire. But this time, at the request of the NRA, he wore his police badge on the left breast pocket of his suit coat. Thomas was introduced to the press as a member of the Cincinnati police force.

In mid-July 1989, Thomas wrote an essay expressing his views on gun control, entitled "Why Gun Laws Waste My Time". The essay appeared in a newspaper for members of Congress called *Roll Call*, and later became a full-page NRA advertisement, reproduced in several other publications. Whalen received a copy of the essay after its initial publication, but prior to its subsequent uses. In August 1989, Whalen instructed Thomas to answer, in writing, a list of questions regarding the essay. Thomas was also "advised [that] the Chief has not authorized it to be published in any commercial media in the future. If there is a possibility that this article may become commercial, it would be proper to stop same."

In August 1989, Thomas's photograph appeared in a publication entitled *The Badge*, a publication which law enforcement members of the NRA receive free of charge. The photo showed Thomas at the Washington rally held on June 6, 1989, in civilian clothes with his badge displayed.

On October 15, 1989, Chief Whalen directed Thomas to submit to an internal affairs interview concerning his participation in the June 1989 rally. On November 6,

1989, Thomas received a written reprimand regarding his participation, based on an alleged violation of § 1.02 of the Police Division's Manual of Rules and Regulations and Disciplinary Process[1] and § 18.135 of its Police Procedure Manual.[2] Thomas was censured for displaying his badge and for being introduced as "Lieutenant Harry Thomas, Cincinnati Police Department"; for failing to request permission to attend the news conference; and for failing to complete a "Public Appearance Report" upon his return to duty.

During July 1990, Thomas spoke at a rally sponsored by the Ohio Constitutional Defense Council in Dayton, Ohio, again opposing gun control.

On January 29, 1991, Thomas received his annual efficiency evaluation. Assistant Chief Ammann did not perform the initial evaluation, but was the reviewing officer. Ammann made comments[3] on the report in which

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[1] Section 1.02 provides:

Members shall not commit any acts or omit any acts which constitute a violation of any of the rules, regulations, procedures, directives, or orders of the Division.

[2] Section 18.135 provides:

Members must obtain Division approval before representing the Police Division at public gatherings, appearing on radio or television, preparing any article for publication, or acting as correspondents to a newspaper or periodical.

A. Purpose:

1. To provide qualified members for public appearances in response to citizen requests for speakers.

2. To provide guidelines for granting permission for public appearances.

3. To provide for a centralized file of public appearance data necessary for budget preparation and planning purposes.

[3] "This reviewer strongly disagrees with the Rater's overall grade [which, while easily within the average range, was second lowest among all lieutenants] but most significantly Items 2 & 8. Lt. Thomas

he disagreed with the opinion of Thomas's immediate superior.

In October 1990, disciplinary charges were filed against Thomas for submitting a false affidavit in a court proceeding.[4] The charges were found to be true, and Thomas was suspended for two days. However, he appealed the finding to the civil service commission, which dismissed the charges.

On November 26, 1990, Ammann issued a written order to Thomas, regarding his responsibilities during public appearances and in attending court on behalf of a criminal defendant:

> You are not to appear in uniform, display any identification card, or display your Police Division badge.
>
> You are not to represent or identify yourself as a Lieutenant in the Cincinnati Police Division in any manner unless required through sworn court testimony.

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has been a public zealot supporting policies completely opposed to both the professional law enforcement community as well as those of the Police Division. It is this Reviewer's opinion that Lt. Thomas' activities bring into question his ability to effectively lead an organizational component within the Police Division. . . . "

[4] Thomas served as an expert witness on behalf of several criminal defendants accused of various firearms-related crimes. In one such case, Thomas signed an affidavit stating, "I have served as an instructor for Cincinnati police training intended to educate police officers in the safe handling of various types of firearms they may encounter in their duties as police officers." Apparently, the title "Instructor" designates a specific job position within the Police Division. Thomas had never been assigned as an instructor. However, one time Thomas was invited to give some information about certain weapons to the rest of a class at the firing range. On the basis of this experience, the civil service commission found that the affidavit was technically not misleading.

> You will prohibit associates, affiliations, sponsors, etc. from making those representations on your behalf . . .
>
> You will not attend court in an on duty status, nor will you be compensated by the Police Division. Your only compensation will be that provided to any other civilian witness; subpoena check.
>
> Nothing within this order prohibits you from exercising the same right as any other civilian in these matters.

On December 14, 1992, Thomas was on duty, scheduled to testify on behalf of a criminal defendant charged with felonious possession of an automatic weapon. Thomas drove an unmarked police car to the courthouse and parked the car in a zone adjacent to the courthouse, designated "No Parking Except Police Vehicles". He then reported to police communications that he was unavailable to receive any official police calls. After testifying, Thomas reported to police communications that he was available again.

While he was in court, the unmarked car was ticketed. Upon his return to his district, Thomas issued a request to the Police Chief for cancellation of the ticket (Cincinnati police procedure provides for the cancellation of tickets when an official vehicle is being operated by an officer in the performance of official duties). He justified the request by saying that "the car is an assigned Police Division vehicle and I was on duty when it was parked. . . ." Assistant Chief Ammann denied the request because of his previous order that Thomas not testify while on duty. Thomas paid the eight-dollar fine.

In July 1991, Thomas filed this § 1983 action against Chief Whalen, Assistant Chief Ammann, and the City of Cincinnati. He alleged that Whalen and Ammann had interfered with, attempted to chill, and penalized him for exercising his First Amendment rights. Thomas specifically alleged that his transfer, the memo regarding his published articles, the questioning regarding one of

those articles, the disciplinary charges associated with the affidavit, Ammann's directive regarding Thomas's future activities, Ammann's unfavorable comments in his review, the parking ticket, and an incident with the SWAT team[5] constituted deliberate harassment by Whalen and Ammann because of his opposition to gun control laws.

On September 23, 1993, the district court dismissed Thomas's claims against the City because Thomas alleged no independent wrongdoing by the City. Moreover, the court found that no municipal policy or custom could have caused Thomas's alleged deprivation. However, the district court declined to grant summary judgment in favor of Whalen and Ammann and thus rejected their claim of qualified immunity, based on the court's finding that a genuine issue of material fact existed regarding the interests of the Cincinnati Police Division in regulating Thomas's speech.

The district court specifically found that "at the time of the Defendants' alleged conduct, it was at least clearly established in the Sixth Circuit that a police officer may not be disciplined for speaking on a matter of public concern unless the speech has adversely affected the operations and internal working of the police department" and that there was a material question of fact on that issue. The district court further found that even if Thomas's speech did adversely affect the Police Division, there was a question of material fact regarding the reasonableness of Ammann's and Whalen's conduct under the circumstances.

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[5] In August 1992, Thomas filed a supplemental complaint in which he alleged further harassment stemming from an incident occurring on May 17, 1992. On that date, Thomas said, he was the ranking officer at the scene of a domestic relations dispute, in which the husband (alone) had barricaded himself inside the home and was armed with a gun. Thomas requested a SWAT team, which request was denied by Ammann, who happened to be the senior command officer on duty that day.

On appeal of the district court's ruling, however, the parties implicitly agree that the question before the court is one of law and not fact.

II.

A district court's denial of a claim of qualified immunity is, of course, immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992). Because application of the doctrine of qualified immunity to a particular defendant is a question of law, *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988), this court reviews *de novo* the district court's determination. *Long v. Norris*, 929 F.2d 1111, 1114 (6th Cir. 1991), *cert. denied sub nom., Jones v. Long*, 112 S. Ct. 187 (1991).

We begin our analysis in this case with the general proposition that government officials performing discretionary functions enjoy qualified immunity from liability for performance of their official duties. This immunity shields them from civil damages, provided that their actions "could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *see also Johnson v. Estate of Laccheo*, 935 F.2d 109, 111 (6th Cir. 1991). Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action in question.

If a right the government official allegedly violated was clearly established at the time of the challenged conduct, "the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. To be outside the scope of qualified immunity, the very action in question need not have previously been held unlawful, but the unlawfulness must

be apparent in light of pre-existing law. *Anderson*, 483 U.S. at 640.

In determining whether a constitutional right is clearly established, we must "look first to decisions of the Supreme Court, then to decisions of this Court and other courts within our circuit, and finally to decisions of other circuits." *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993) (*quoting Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 939 (1992)).

> In the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.

Ohio Civil Service Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988).

In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Supreme Court reaffirmed the test to be used in determining whether the speech of a public employee is constitutionally protected, albeit in a context materially different from the factual situation in this case:

> The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." This

> balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

Id. at 384-5 (citations omitted) (*quoted in Williams v. Kentucky*, 24 F.3d 1526, 1534 (6th Cir.), *cert denied sub nom., Allen v. Williams*, 115 S. Ct. 358 (1994)). Thus, determining whether the defendants could rightfully take adverse employment action against Thomas on the basis of his speech (or, to put it differently, whether they violated Thomas's clearly established rights) is a two-step process.

The threshold inquiry is whether the speech that Thomas cites as the basis for defendants' actions "may be 'fairly characterized as constituting speech on a matter of public concern.'" *Id.* (*quoting Connick v. Myers*, 461 U.S. 138, 146 (1983)); *see also Wilson v. City of Littleton*, 732 F.2d 765, 769 (10th Cir. 1984) (First Amendment did not protect police officer who wore a black shroud across his badge to mourn death of police officer from another town; not a matter of public concern). The debate over the propriety of gun control legislation is, obviously, a matter of public concern.

We must next determine whether Thomas's interest in speaking freely is outweighed by a state interest in promoting the efficiency of public services. *Rankin*, 438 U.S. at 388. "The more central a matter of public concern

the speech [or association] at issue, the stronger the employer's showing of counter-balancing governmental interest must be." *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir.1991). The determination of the appropriate balance is a legal determination to be made by the court. *Connick*, 461 U.S. at 150.

In essence, Thomas claims that the defendants have restricted his speech in two ways. He has been ordered, when pursuing his NRA-type advocacy, (1) "not to appear in uniform, display any identification card, or display [his] Police Division badge", and (2) not to "represent or identify [him]self as a Lieutenant in the Cincinnati Police Division". He admits that his speech and activities have not otherwise been restricted. Identification of Thomas as a police officer certainly has communicative force all its own, relevant to his comments in this arena. The wearing of Thomas's police badge in conjunction with his lobbying is similarly expressive. However, they must be analyzed separately to discern whether Thomas had a "clearly established right" in either area.

"[F]reedom of speech is not traded for an officer's badge." *Biggs v. Village of Dupo*, 892 F.2d 1298, 1303 (7th Cir. 1990); *see also*, *Boulware v. Battaglia*, 327 F. Supp. 368, 378 (D. Del. 1971). Police officers, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights by virtue of their public employment, or because such employment is within a command-oriented agency of local government. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

However, in *Kelley v. Johnson*, 425 U.S. 238, 247 (1976), the Supreme Court held that a law enforcement agency's "[c]hoice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power." The Supreme Court has given deference to military uniform regulations when a public employee's First Amendment rights were at

issue. "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

A paramilitary law enforcement unit, such as the police, has many of the same interests as the military in regulating its employees' uniforms. In *United States Dep't of Justice v. Federal Labor Relations Auth.*, 955 F.2d 998 (5th Cir. 1992), the Fifth Circuit concluded that allowing Immigration and Naturalization Service border patrol agents to wear union pins while on duty would create factionalism, interfere with discipline, and create an appearance of partiality. *Id.* at 1006. The court held:

> It is not unreasonable to assume that allowing this schism to manifest itself in the form of a pin on the uniforms of the pro-union agents will create added tension; in short, there will be occasions when a union button can be interpreted as a symbol of defiance against supervisors and as a split in solidarity among union and non-union agents, which will have an impact on mission, discipline, and esprit de corps. . . . [I]t is reasonable to conclude that allowing border patrol agents to wear union pins would interfere with an appearance to the public of neutrality and impartiality, which is important to the mission of all law enforcement agencies.

955 F.2d at 1007.

As the defendants now point out, no court has recognized a right to exploit one's rank in public employment solely for the purpose of enhancing credibility for personal or political gain -- in effect, to use the fact of public employment as a "soap box" from which the employee can advocate a political position on an issue of public debate. In our own circuit, reasonable restrictions on the use of public employment to advance personal opinion have been found not to violate the employee's First Amendment

rights. *See, e.g., Detroit Fire Fighters Ass'n, Local 334 v. City of Detroit*, 508 F. Supp. 172 (E.D. Mich. 1981).

In *Detroit Fire Fighters*, the district court held that the City of Detroit could reasonably restrict the public appearance of uniformed firefighters to advocate the defeat of a proposed charter amendment, without running afoul of the First Amendment. *Id.* at 177. In reaching its decision, the court noted that political neutrality on the part of a paramilitary organization such as the fire department outweighs the right of individual firefighters to appear in uniform in television advertisements advocating a position on a political issue. *Id.* The same analysis is patently applicable to the issue of gun control, where guns represent a daily life-and-death issue for every police officer.

In arguing that the action of the defendants violated Lt. Thomas's right of free speech, counsel for the plaintiff points to *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988), in which a part-time police officer was denied a permanent position because she answered certain questions from a reporter relating to charges of discrimination that she had leveled against the police department and that previously had been reported by the newspaper. This court found that denial of the permanent position violated the plaintiff's right to free speech but, at the same time, emphasized that its finding of public concern was "strengthened by the fact that the plaintiff did not solicit the attention of the media, but simply responded to questions regarding an existing controversy." *Id.* at 613. We take this ruling to mean that police officers need not hide the fact of their employment. In this case, however, Thomas was advertising and invoking his experience not just as a police officer, but as a highly ranked member of the Cincinnati Police Division, in a manner that entangled the Division in a matter of national controversy. *Cf. Rhan v. Drake Inc.*, 3 F.3d 407, 413 (6th Cir. 1994).

We conclude from the foregoing analysis that, although Thomas may not be required to conceal his employment as a police officer, his right to speak as a member of the

Cincinnati Police Division is not clearly established, when evaluated under the balancing test set out in *Rankin v. McPherson*, 483 U.S. at 384-5. The extra margin of credibility lent his cause by exploiting his affiliation does not outweigh the Cincinnati Police Division's interest in preserving the appearance of impartiality in areas closely related to its core mission.

Indeed, several courts have recognized the interest of a governmental entity in preserving the appearance of impartiality. *See e.g.*, *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S.548, 565 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."); *Paulos v. Breier*, 507 F.2d 1383, 1386 (7th Cir. 1974) (recognizing and protecting interest of municipality in preserving nonpartisan police force and appearance thereof); *Connealy v. Walsh*, 412 F. Supp.146, 158 (W.D. Mo. 1976) (upholding juvenile court's ban on partisan bumper stickers on employee cars; compelling state interest in preserving public confidence in judiciary outweighs plaintiff's interest in publicly expressing her political preference through a bumper sticker). These arguments seem particularly relevant when applied to police employment and gun control, and thus buttress our conclusion that Lt.Thomas did not have a clearly established right to invoke the name of the Cincinnati Police Division or display the police department's insignia in order to enhance his own credibility in advocating a political position.

III.

Despite the complexities of the law in this area, a review of certain undisputed facts in the record before us makes the ultimate determination easier. That record indicates that Chief Whalen and Assistant Chief Ammann have done nothing to interfere with Thomas's ability to communicate

his pro-gun message; their actions were designed simply to dissociate the Cincinnati Police Division from that message. Thomas has not been penalized in any appreciable way even when called to task: his career has not been set back, his salary remains the same, and he concedes that he continues his First Amendment activities. Because Thomas's right to involve the Division in his NRA advocacy is not clearly established by the proof, a burden that fell on Thomas, defendants Whalen and Ammann are entitled to qualified immunity. The judgment of the district court is therefore REVERSED, and the case is DISMISSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
CLERK
SEP 23, 1993

HARRY D. THOMAS,

Plaintiff,

vs.

LAWRENCE WHALEN; EDWARD AMMANN;
and the CITY OF CINCINNATI, OHIO

Defendants.

No. C-1-91-442

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is a civil action under 42 U.S.C. § 1983, filed by the Plaintiff, Harry D. Thomas, a lieutenant with the Cincinnati, Ohio, Police Division ("CPD"). Defendants are the City of Cincinnati (the "City"), former Police Chief Lawrence Whalen (currently retired), and former Operations Bureau Commander Edward Ammann (currently Assistant Chief). Plaintiff alleges that the Defendants have violated his civil rights by attempting to interfere with his First Amendment right to freedom of speech and by attempting to

chill the future exercise of that right. Plaintiff seeks declaratory and injunctive relief, as well as both compensatory and punitive damages. Before the court is a motion for summary judgment on behalf of all Defendants. Plaintiff has responded to the motion.

Rule 56 of the Federal Rules of Civil Procedure governs the disposition of motions for summary judgment. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, judgment will be granted to the movant. Fed.R. Civ. P. 56(c). Summary judgment is appropriate only if it is clear that a trial is unnecessary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-52 (1986). When a motion for summary judgment is properly supported showing absence of a genuine issue for trial, the non-moving party must go beyond the pleadings and designate specific facts in the evidentiary record showing there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter but only to determine whether there is a genuine issue for trial. *Liberty Lobby*, 477, U.S. at 249. Doubts as to the existence of a genuine issue for trial are resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

The undisputed facts, based on exhibits and unrefuted affidavits, are as follows: Plaintiff is an outspoken opponent of gun control laws, and is a supporter of the National Rifle Association ("NRA"). On September 7, 1988, Plaintiff attended an NRA-sponsored rally in Washington, D.C., opposing proposed gun control legislation--the "Brady Bill." At the rally, Plaintiff participated in a press conference, and

spoke to various elected officials. He was dressed in civilian clothes, but identified himself as a police officer.

On September 18, 1988, Plaintiff allegedly had a conversation with Defendant Ammann, in which Ammann told Plaintiff that he was not a team player, that he could not expect to receive any support from the CPD administration, and that he was ruining his career by his opposition to gun control measures. Ammann also allegedly told Plaintiff that he would be transferred, and that he would not be informed of the reasons for the transfer. That same day, Plaintiff was transferred for district three to district two within the CPD.

On June 6, 1989, Plaintiff attended a second NRA-sponsored rally in Washington, D.C., opposing legislation dealing with semi-automatic firearms. Plaintiff again spoke to media representatives at this rally. He was dressed in civilian clothes, but wore his police badge on the left breast pocket of his suit coat, and was introduced as being with the CPD.

In mid-July 1989, Plaintiff wrote an essay expressing his views on gun control, entitled "Why Gun Laws Waste My Time." The essay appeared in a newspaper for members of Congress called *Roll Call*, and became a full-page NRA advertisement, appearing in several other publications. Defendant Whalen received a copy of the essay after its publication in *Roll Call*, but prior to its appearance in other publications. In August 1989, Plaintiff was instructed to answer, in writing, certain questions regarding the essay and its content, and was informed that "be advised the Chief has not authorized it to be published in any commercial media in the future. If there is a possibility that this article may

become commercial, it would be proper to stop same." Defendant Whalen then instructed Plaintiff to submit responses to a list of questions regarding the essay; Plaintiff complied with this instruction. Also in August 1989, Plaintiff's photograph appeared in a publication called *The Badge*, which is sent without charge to law enforcement members of the NRA. The photograph had been taken at the June 6, 1989, NRA rally, and showed Plaintiff wearing a suit and tie, with his badge displayed on his left suit coat pocket.

On October 15, 1989, Plaintiff was directed to submit to an internal affairs interview concerning his appearance at the rally. On November 6, 1989, Plaintiff was served with a written reprimand concerning his appearance at the rally, which supposedly violated section 1.02 of the CPD Manual of Rules and Regulations and Disciplinary Process[1], and section 18.135 of the CPD Police Procedure Manual.[2]

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[1] Section 1.02 provides:

> Members shall not commit any acts or omit any acts which constitute a violation of any of the rules, regulations, procedures, directives, or orders of the division.

[2] Section 18.135 provides in part:

> Members must obtain Division Approval before representing the Police Division at public gatherings, appearing on radio or television, preparing any article for publication, or acting as correspondents to a newspaper or periodical.
>
> A. Purpose
>
> 1. To provide qualified members for public appearances in response to citizen requests for speakers.
>
> 2. To provide guidelines for granting permission for public appearances.

In July 1990, Plaintiff spoke at a public rally sponsored by the Ohio Constitutional Defense Council, again in opposition to gun control. On November 26, 1990, Plaintiff received from Defendant Ammann special orders instructing Plaintiff that at future public appearances, he was not to appear in uniform, display his badge, or identify himself as being with the CPD in any way. On January 29, 1991, Plaintiff received his annual efficiency evaluation. Defendant Ammann was the reviewing officer, and made comments on the report which disagreed with the opinion of Plaintiff's immediate supervisor.[3]

Plaintiff also indicates that in October 1990, disciplinary charges were filed against him for submitting false affidavits in a court proceeding. The charges were found to be true, and Plaintiff was issued a two-day suspension; however, Plaintiff appealed the finding to the civil service commission, which dismissed the charges. In addition, Plaintiff alleges that in December 1990, he was forced to pay a parking ticket which he received while using an official police vehicle for attendance at a court hearing, in contradiction of the standard policy of having such tickets voided. Plaintiff also describes

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3. To provide for a centralized file of public appearance data necessary for budget preparation and planning purposes.

[3] These comments, in part, were as follows:

"This reviewer strongly disagrees with the Rater's overall grade but most significantly Items 2 & 8. Lt. Thomas has been a public zealot supporting policies completely opposed to both the professional law enforcement community as well as those of the Division. It is this Reviewer's opinion that Lt. Thomas' activities bring into question his ability to effectively lead an organizational component within the Police Division . . .

an incident on May 17, 1992, in which he requested the assistance of the SWAT team in what he believed to be a hazardous entry situation. Defendant Ammann refused Plaintiff's request for the SWAT team, supposedly because there was insufficient indications that it was necessary. Plaintiff, however, contends that the refusal endangered his life, and the lives of others. Plaintiff alleges that the December 1990 disciplinary charges, the parking ticket, and the incident with the SWAT team were deliberate harassment on the part of Defendants Whalen and Ammann because of his opposition to gun control laws.

Claims Against the City of Cincinnati

It is axiomatic that municipal liability under 42 U.S.C. § 1983 must be based on the existence of, and actions taken pursuant to, an official policy or custom, and may not be based solely on *respondeat superior*. *See Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658 (1978); *see also, City of St. Louis v. Praprotnik;* 485 U.S. 112 (1988); *City of Oklahoma v. Tuttle,* 471 U.S. 808 (1985). The inquiry is "whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton v. Harris,* 489 U.S. 378, 385 (1989).

In Plaintiff's complaint, he makes only a single allegation against the City:

> Defendants Whalen and Ammann are employees of Defendant City of Cincinnati. Responsible officials of the City of Cincinnati, specifically including the Safety Director of the City of Cincinnati, have known or should have known of the actions of Defendant

> Whalen and Ammann as alleged and of the effect and intent of said actions, but have taken no steps to correct or prevent such actions.

This statement appears to allege merely *respondeat superior*, as it does not specifically allege the existence of a policy or custom on the part of the City which caused a constitutional violation. Furthermore, even if the court assumes, for the sake of argument, that the complaint can be read to imply that the City has a policy of condoning the actions of Defendants Whalen and Ammann, the Plaintiff has offered no evidence to support such an allegation. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp., supra,* 477 U.S. at 322.

Plaintiff argues that the actions of Defendants Whalen and Ammann were purportedly based on section 18.135 of the CPD Police Procedure Manual, which is indisputably a City policy, and that this is sufficient identification of a policy or custom to withstand summary judgment. This argument is without merit. It is obvious from the complaint, and from Plaintiff's memorandum opposing summary judgment, that he is not claiming that section 18.135, in and of itself, caused the alleged constitutional deprivation. Plaintiff clearly contends that "Defendants Whalen and Ammann intentionally *misused and abused this policy of the City of Cincinnati* in an attempt to intimidate Plaintiff with respect to his exercise of free speech." (Pltf's Mem. Opp. S.J. at 6-7.) Absent this alleged misuse and abuse by Defendants Whalen and Ammann, the City Policy, section 18.135, is not objectionable.

With regard to the City of Cincinnati, the court finds that there is no genuine issue of material fact, and the City is entitled to judgment as a matter of law.

Claims Against Defendants Whalen and Ammann

In *Rankin v. McPherson,* 483 U.S. 378 (1987), the Supreme Court reaffirmed the test to be used in determining whether the speech of a public employee is constitutionally protected. The test "requires ' a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* at 384 (quoting *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968)). Therefore, speech is protected if 1) it addresses a matter of public concern, and 2) the employer has no overriding state interest in efficient public service that would be undermined by the speech. *Id., Meyers v. City of Cincinnati,* 934 F. 2d 726, 729 (6th Cir. 1991); *Matulin v. Village of Lodi,* 862 F. 2d 609, 612-14 (6th Cir. 1988).

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers,* 461 U.S. 138, 147-48 (1983). In the present case, there is no doubt that the Plaintiff's speech, both the essay and his attendance at the public rallies, addressed a matter of public concern. The issue of gun control was at the time of the events complained of, and still is, on of strong and sometimes heated national debate. Therefore, the resolution of this case turns on the second prong of the balancing test, which "compare[s] the

employee's right to speak with the public employer's need to run an efficient organization." *Pickering,* 391 U.S. at 568.

In order to justify restrictions on an employee's speech on a matter of public concern, the speech must be of a nature which "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin,* 483 U.S. at 388 (citing *Pickering,* 391 U.S. at 570-73). The Defendants bear the burden of showing a legitimate justification for discipline. *Id.* (citing *Connick,* 461 U.S. at 150. In this case, although the Defendants argue in their supporting memorandum that the governmental interest in maintaining the reputation of the CPD overrides the Plaintiff's right to free speech, Defendants have presented no actual evidence with regard to the factors set forth in *Pickering.* Therefore, there is a genuine issue of material fact as to the exactly how Plaintiff's speech affected the operations of the CPD.

Defendants Whalen and Ammann also argue that they are entitled to qualified immunity. Police officials are entitled to qualified immunity in § 1983 actions if their conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *see also, Malley v. Briggs,* 475 U.S. 335, 345 (1986). In *Anderson v. Creighton,* 483 U.S. 635 (1987), the Supreme Court held that the actions of government officials are protected by qualified immunity unless the contours of the right allegedly violated "are sufficiently clear that a reasonable official would understand

that what he is doing violates that right." *Id.* at 640. The validity of the act in question must be determined based on the officials' perspective on the events which occurred. *Id.; see also Malley, supra.*

The case-by-case approach to First Amendment concerns, necessitated by the balancing test of *Pickering*, 391 U.S. 563, and *Rankin,* 483 U.S. 378, has resulted in imprecise standards for determining when an employee's constitutional rights have been violated, and makes it difficult to ascertain whether specific rights are "clearly established." Nevertheless, these cases set forth guidelines for the conduct of government officials in disciplining public employees for their speech. The Sixth Circuit applied these general principles in the context of a police department in *Matulin v. Village of Lodi,* 862 F. 2d 609 (6th Cir. 1988), finding that in the absence of evidence that her speech had an adverse impact on departmental performance, a police officer's statements regarding pending discrimination claims against the department were protected by the First Amendment.

The court finds that, at the time of the Defendants' alleged conduct, it was at least clearly established in the Sixth Circuit that a police officer may not be disciplined for speaking on a matter of public concern unless the speech has adversely affected the operations and internal working of the police department. As stated previously, there is material question of fact on this issue.

In addition, even if Plaintiff's speech can be said to have adversely affected the CPD, there is a question of material fact regarding whether the conduct of Defendants Whalen and Ammann was reasonable under the circumstances. There is

a suggestion in the evidence that Defendants' actions were intended as harassment and retaliation for Plaintiff's views, rather than as discipline and supervision. Therefore, Defendants Whalen and Ammann are not entitled to qualified immunity, and summary judgment on Plaintiff's claims against them is not appropriate.

Defendants' motion for summary judgment is hereby GRANTED as to the City of Cincinnati, and DENIED as to Lawrence Whalen and Edward Ammann.

IT IS SO ORDERED.

James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

September 20, 1993
DATE

APPENDIX C

CONSTITUTION OF THE UNITED STATES
AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
OCT 24 1995
CLERK

No. 95-510

In The

Supreme Court of the United States

October Term, 1995

HARRY D. THOMAS,

Petitioner,

v.

LAWRENCE WHALEN and EDWARD AMMANN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

1. Is a police officer's First Amendment right to speak out publicly on matters of public concern infringed by administrative actions by superior officers intended to prevent identification of the police officer as a police officer, where that officer exploited his badge, his rank, and his employment to enhance his credibility for personal gain?

2. In an action under 42 U.S.C. 1983, is qualified immunity available to executives of a police department who take reasonable administrative actions to preserve the integrity, order, efficiency and disciplining of the Police division against a police officer to prohibit the officer from making unauthorized public presentations, exploiting his employment to enhance his credibility for personal gain during speech which is not clearly protected?

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STATUTE

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STATEMENT OF THE CASE

This case stems from disciplinary action taken by police department officials against a Cincinnati Police Division officer who made several unauthorized public presentations, both written and oral, on behalf of the National Rifle Association ("NRA"), while wearing official insignia and identifying himself as a Cincinnati Police lieutenant.

Thomas, a lieutenant in the Cincinnati Police Division,[1] is an outspoken opponent of gun control laws and an active member of the NRA. On September 7, 1988, Thomas attended a rally in Washington, D.C. sponsored by the NRA to protest the Brady Bill. During the rally, Thomas appeared at a press conference and later spoke to various elected officials. He was dressed in civilian clothes, but verbally identified himself as a police officer.

Thomas alleged that after he returned from Washington, he had a conversation on September 18, 1988, with Assistant Chief Ammann, who at that time supervised the police bureau to which Thomas was assigned. According to Thomas, Ammann told Thomas that he was not a team player, could not expect to receive any support from the administration of the Police Division, and was ruining his career by this opposition to gun control measures. Allegedly, Ammann also told Thomas that he was to be transferred and that he would not be informed of the reasons for the transfer. That day, Thomas said, he was

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[1] The Cincinnati Police Division is a component of the Safety Department of the City of Cincinnati. Article V, Charter of the City of Cincinnati.

transferred from District 3 to District 2. According to Whalen and Ammann, however, Thomas was actually transferred on September 14, 1988, along with the other lieutenants, as part of a standard rotation.

On June 6, 1989, Thomas attended a second NRA sponsored rally in Washington. He again spoke to media representatives and again was dressed in civilian attire. But this time, at the request of the NRA, he wore his police badge on the left breast pocket of his suit coat. Thomas was introduced to the press as a member of the Cincinnati police force.

In mid-July 1989, Thomas wrote an essay expressing his views on gun control, entitled "Why Gun Laws Waste My Time". The essay appeared in a newspaper for members of Congress called *Roll Call*, and later became a full-page NRA advertisement, reproduced in several other publications. Whalen received a copy of the essay after its initial publication, but prior to its subsequent uses. In August 1989, Whalen instructed Thomas to answer, in writing, a list of questions regarding the essay. Thomas was also "advised [that] the Chief has not authorized it to be published in any commercial media in the future. If there is a possibility that this article may become commercial, it would be proper to stop same."

Also, in August 1989, Thomas' photograph appeared in a publication entitled *The Badge*, a publication which law enforcement members of the NRA receive free of charge. The photo showed Thomas at the Washington rally held on June 6, 1989, in civilian clothes with his badge displayed.

On October 15, 1989, Chief Whalen directed Thomas to submit to an internal affairs interview concerning his participation in the June 1989 rally. On November 6, 1989, Thomas received a written reprimand regarding his participation based on a violation of § 1.02 of the Police Division's Manual of Rules and Regulations and Disciplinary Process and § 18.135 of its Police Procedure Manual. Thomas was censured for displaying his badge and for being introduced as "Lieutenant Harry Thomas, Cincinnati Police Department"; for failing to request permission to attend the news conference; and for failing to complete a "Public Appearance Report" upon his return to duty.

During July 1990, Thomas spoke at a rally sponsored by the Ohio Constitutional Defense Council in Dayton, Ohio, again opposing gun control.

In October 1990, disciplinary charges were filed against Thomas for submitting a false affidavit in a court proceeding. The charges were found to be true, and Thomas was suspended for two days. However, he appealed the finding to the Civil Service Commission, which dismissed the charges.

On November 26, 1990, Ammann issued a written order to Thomas, regarding his responsibilities during public appearances and in attending court on behalf of a criminal defendant:

> You are not to appear in uniform, display any identification card, or display your Police Division badge.
>
> You are not to represent or identify yourself as a Lieutenant in the Cincinnati Police Division in

> any manner unless required through sworn court testimony.
>
> You will prohibit associates, affiliations, sponsors, etc. from making those representations on your behalf. . . .
>
> You will not attend court in an on duty status, nor will you be compensated by the Police Division. Your only compensation will be that provided to any other civilian witness; subpoena check.
>
> Nothing within this order prohibits you from exercising the same right as any other civilian in these matters.

Lt. Thomas brought this action against the former Chief of Police Lawrence E. Whalen[2] and former Assistant Police Chief Edward Ammann,[3] in their individual and official capacities, and the City under 42 U.S.C. § 1983. Thomas alleged that Colonel Whalen and Lt. Colonel Ammann " . . . have taken various steps intended to interfere with Plaintiff's exercise of his First Amendment Rights (sic) . . . and further intended to chill the future exercise of said First Amendment rights . . . ". Thomas alleged that Colonel Whalen and/or Lt. Colonel Ammann were responsible for eight discrete supervisory, administrative acts or decisions which "attempted" to violate his First Amendment rights: (1) transferred from a duty assignment; (2) attempted to prevent publishing of his "views" in articles and opinion pieces; (3) required

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[2] During the pendency of this lawsuit, Colonel Whalen retired from the Cincinnati Police Division.

[3] During the pendency of this lawsuit, Lt. Colonel Ammann retired from the Cincinnati Police Division.

answers to questions involving the content of published articles; (4) required interviews with the investigative unit of the Police Division; (5) issued orders directing him not to identify his employment with the Police Division in published articles; (6) issued orders concerning the use of official police vehicles; (7) included remarks in efficiency reports about his political beliefs, and (8) denied use of Special Weapons and Tactics Team. Thomas alleged that the City was liable for the " . . . actions of Defendants Whalen and Ammann as alleged . . . " because City officials "have taken no steps to correct or prevent such actions."

The City denied that any municipal policy had been the moving force to any alleged deprivation of free speech or had inflicted any constitutional injury. Colonel Whalen and Lt. Colonel Ammann denied that they had violated any clearly established rights of a public employee. They insisted that their actions were reasonably calculated under the circumstances to administer the Cincinnati Police Division without violating any well-established First Amendment rights.

Following the assignment of the district judge to the case by the Chief Judge of the Sixth Circuit Court of Appeals, the City and Messrs. Whalen and Ammann moved for summary judgment on April 17, 1993 on the grounds that there were no material issues of fact and they were entitled to judgment as a matter of law. The City asserted a right to judgment as a matter of law because the undisputed material facts demonstrated that a municipal policy was not the moving force that inflicted any alleged constitutional deprivation. Colonel Whalen

and Lt. Colonel Ammann also asserted qualified immunity from personal liability for any violation of the First Amendment. Thomas filed a memorandum in opposition. The District Court granted in part and denied in part the motion for summary judgment. The District Court found that a municipal policy or custom was not the cause or the moving force of any constitutional deprivation. Therefore, the City was entitled to summary judgment as a matter of law. However, the Court found that Messrs. Whalen and Ammann were not entitled to qualified immunity. While recognizing that case law "makes it difficult to ascertain whether specific rights are 'clearly established'," the District Court found that public employee rights to free speech were *generally* established in the Sixth Circuit. (emphasis added). Absent "actual evidence" of any adverse impact upon the Police Division, the Court could not conclude that either Police Chief Whalen or Assistant Chief Ammann were reasonable in response to Thomas' exploitation of his employment in the Police Division for his personal advocacy.

On October 13, 1993, Messrs. Whalen and Ammann appealed the judgment denying qualified immunity to the Sixth Circuit Court of Appeals. On April 21, 1995, the Court of Appeals found that the defendants took reasonable administrative action to preclude Lt. Thomas from exploiting his uniform and his position in the police department, while continuing to honor his First Amendment right to debate the propriety of gun control legislation. The Court of Appeals reversed the district court and concluded that the defendants did not violate a "clearly

established right" belonging to plaintiff, thus the two were entitled to qualified immunity from suit.

SUMMARY OF ARGUMENT

Accommodating the competing societal values in suits against government officials, the Supreme Court has struck the balance in favor of cloaking government officials performing discretionary functions with qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Johnson v. Estate of Laccheo*, 935 F.2d 109, 111 (6th Cir. 1991). "We therefore hold that government officials performing discretionary functions *generally* are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added); *see also Mumford v. Zieba*, 4 F.3d 429, 432 (6th Cir. 1993). In regard to government officials exercising discretionary functions, qualified immunity provides ample protection "to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Busby v. City of Orlando*, 931 F.2d 764, 773 (11th Cir. 1991).

During all times pertinent to this litigation, Police Chief Lawrence Whalen and Assistant Chief Edward Ammann were senior officials vested with discretionary authority in the administration of the Cincinnati Police Division. Whether they may be personally liable for any unlawful official action depends upon the "objective legal reasonableness" of the action, assessed in light of the

legal rules that were "clearly established" at the time the action was taken. *Johnson*, 935 F.2d at 111 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

If a right the government official allegedly violated was clearly established at the time of the challenged conduct, "the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818-19. For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. To be outside the scope of qualified immunity, the very action in question need not have previously been held unlawful, but the unlawfulness must be apparent in light of pre-existing law. *Anderson*, 483 U.S. at 640.

Both Messrs. Whalen and Ammann were confronted with a Lieutenant in the Cincinnati Police Division who willfully abused and exploited his badge, rank, and position in the Cincinnati Police Division for the purpose of enhancing his credibility. Whalen and Ammann took reasonable administrative action to preclude Thomas from exploiting his badge and position in the Police Division, while respecting his First Amendment rights.

No court has recognized a right to use or abuse public employment solely for the purpose of enhancing credibility for personal gain. Public employment cannot be abused as a soap box from which an employee can enhance the credibility of his personal opinion. Instead, reasonable restrictions on the use of public employment to advance personal views have been found not to violate

any constitutional rights. *Detroit Firefighters Ass'n v. City of Detroit*, 508 F.Supp. 172, 177 (E.D. Mi. 1981).

A public employee's right to free speech is not and has not been clearly established within the context of qualified immunity. Moreover, a public employee does not enjoy any right to use or exploit his employment to enhance credibility in the debate of public issues. The contours of the public employee's right to free speech in the employment setting are, therefore, not sufficiently clear to a reasonable police official. Accordingly, Thomas' right of free speech within the context of his employment in the facts of this case was not clearly established when Police Chief Whalen and Lt. Colonel Ammann exercised reasonable administrative supervision over his exploitation of his position in the Cincinnati Police Division. These officers are thus entitled to qualified immunity.

I. SUPERIOR OFFICERS' ACTIONS IN PROHIBITING THE USE OF POLICE INSIGNIA FOR IDENTIFICATION PURPOSES WERE REASONABLE FOR THE POLICE DIVISION TO MAINTAIN AN APPEARANCE OF IMPARTIALITY ON AN ISSUE OF PUBLIC DIVISIVENESS.

In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Supreme Court reaffirmed the test to be used in determining whether the speech of a public employee is constitutionally protected:

> The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the

> interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." This balancing is necessary in order to accommodate the dual role of the public employer as a producer of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

Id. at 384-85 (citations omitted). Therefore a two-step process is necessary to determine whether the defendants could rightfully take adverse employment action against Thomas on the basis of his speech.

The initial inquiry is whether the speech that Thomas cites as the basis for defendants' actions "may be 'fairly characterized as constituting speech on a matter of public concern.' " *Rankin*, 483 U.S. at 384-85, (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)); *see also Wilson v. Littleton*, 732 F.2d 765, 769 (10th Cir. 1984) (First Amendment did not protect police officer who wore a black shroud across his badge to mourn death of police officer from another town; not a matter of public concern). Obviously, debate concerning gun control is a matter of public concern.

The next inquiry is into whether Thomas' interest in speaking freely is outweighed by a state interest in prompting the efficiency of public services. *Rankin*, 438 U.S. at 388. "The more central a matter of public concern the speech [or association] at issue, the stronger the employer's showing of counter-balancing governmental interest must be." *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991). The court is left to determine the appropriate balance. *Connick*, 461 U.S. at 150.

A police officer does not give up his right to free speech in exchange for his badge. *Biggs v. Village of Dupo*, 892 F.2d 1298, 1303 (7th Cir. 1990). Police officers are not relegated to a watered-down version of constitutional rights by virtue of their public employment, or because such employment is within a command-oriented agency of local government. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

However, in *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) the Supreme Court held that a law enforcement agency's "[c]hoice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power." The Supreme Court has cited the importance of the military's fostering of instinctive obedience, unity, commitment, and espirit de corps in deferring to military uniform regulations when a public employee's First Amendment rights were at stake. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

A law enforcement unit, such as the police, has many of the same interests as the military in regulating its

employees' uniforms. In *United States Dep't of Justice v. Federal Labor Relation Auth.*, 955 F.2d 998 (5th Cir. 1992), the Fifth Circuit determined that allowing Immigration and Naturalization Service border patrol agents to wear union pins while on duty would create factionalism, interfere with discipline, and create an appearance of partiality. *Id.* at 1006. The court found that wearing union pins would interfere with an appearance to the public of neutrality and impartiality that is important to the mission of all law enforcement agencies. *Id.* at 1007. Similarly, the Cincinnati Police Division could regulate Thomas' wearing of his badge off-duty at times that would interfere with an appearance of neutrality or impartiality, such as an NRA rally.

Police officers need not hide the fact of public employment. In this case, however, Thomas was advertising and invoking his experience not just as a police officer, but as a highly ranked member of the Cincinnati Police Division, in a manner that entangled the Division in a matter of national controversy.

To be sure, several courts have recognized the interest of a governmental entity in preserving the appearance of impartiality. *See, e.g., United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent."); *Paulos v. Breier*, 507 F.2d 1383, 1386 (7th Cir. 1974) (recognizing and protecting interest of municipality in preserving nonpartisan police force and appearance thereof);

Connely v. Walsh, 412 F.Supp. 146, 158 (W.D. Mo. 1976) (upholding juvenile court's ban on partisan bumper stickers on employee cars; compelling state interest in preserving public confidence in judiciary outweighs plaintiff's interest in publicly expressing her political preference through a bumper sticker). The Sixth Circuit found that these arguments are particularly relevant when applied to police employment and gun control, and thus support the conclusion that the Cincinnati Police Division had an interest in maintaining neutrality. Also, Lt. Thomas did not have a clearly established right to use the police department's insignia in order to enhance his own credibility in advocating a political position.

II. POLICE OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY WHEN UNDER THE FACTS AND CIRCUMSTANCES OF THE CASE THE RIGHT OF A SUBORDINATE POLICE OFFICER IN THE CONTEXT OF HIS EMPLOYMENT TO EXPLOIT HIS BADGE, RANK, OR HIS EMPLOYMENT TO ENHANCE HIS CREDIBILITY FOR PERSONAL GAIN IS NOT CLEARLY ESTABLISHED.

The words "clearly established constitutional right" are not to be read so broadly as to defeat the norm of qualified immunity. The words "clearly established constitutional right" may not be used to read the defense of immunity out of federal law by the facile expedient of stating constitutional rights in the most general possible terms. *Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993); *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987). Rather, the right the official is alleged to have violated must have

been "clearly established" in a more particularized sense. *Anderson v. Creighton*, 483 U.S. at 640. "The right must be sufficiently particularized to put potential defendants on notice that their conduct is probably unlawful." *Colaizzi*, 812 F.2d at 308 (quoting *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986)). "Courts require officials to adhere to rules that have been made specific enough to set operational guidelines." *Greenberg v. Kmetko*, 922 F.2d 382, 384 (7th Cir. 1991). The characterization of the right must be sufficiently particularized to enable the District Court to determine whether the officers were on notice that their actions violated clearly established law. *Rakovich v. Wade*, 850 F.2d 1180, 1211 (7th Cir. 1988). Such a particularized statement is necessary because officials can act without fear of litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages. *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

To determine whether a right is "clearly established," the Court must first define or characterize the government official's actions according to the specific facts of the case. *Rakovich*, 850 F.2d at 1209. In this case, Colonel Whalen and Lt. Colonel Ammann assigned a lieutenant in the regular rotation to a new district; investigated the unauthorized use of a lieutenant's badge and/or rank to advance the interests of a private organization; disciplined a member of the division for a violation of established rules and regulations; issued instructive guidelines and orders for future guidance to prevent exploitation of the badge, rank and position in the Cincinnati Police Division for advocating private interests; refused to cancel a parking citation in accordance with stated policy;

prepared an annual evaluation; and managed the deployment of SWAT. This description or characterization must then be compared to the body of law existing at the time of the alleged violation to determine if the actions of the Police Chief and Assistant Police Chief violated clearly established law. *Rakovich*, 850 F.2d at 1209.

A clearly established right can only be discerned from closely analogous cases. *Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993). "While cases involving the exact fact pattern at bar are unnecessary, case law in a closely analogous area is crucial to permit us to conclude that reasonably diligent government officials would have known of the case law, related it to the situation at hand, and molded their conduct accordingly." *Rakovich*, 850 F.2d at 1209 (citations omitted).[4]

The inquiry must not focus upon any analogous case. Instead, a finding of a clearly established constitutional right in this Circuit must be supported by precedent from the Supreme Court or the Circuit in which the court sits, or in the alternative, by decisions from other Circuits. *Mumford v. Zieba*, 4 F.3d 429, 432 (6th Cir. 1993). "Although decisions of other courts can clearly establish the law, such decisions must both point unmistakably to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional." *Mumford*, 4 F.3d at 432-33

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[4] "It is the plaintiff who bears the burden of establishing the existence of the allegedly clearly established right." *Rice v. Burks*, 999 F.2d at 1174 (quoting *Rakovich v. Wade*, 850 F.2d at 1209).

(quoting *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992)).

Thomas claims that the defendants have restricted his speech in two ways. He has been ordered when pursuing his NRA-type advocacy, (1) not to appear in uniform, display any identification card, or display [his] Police Division badge", and (2) not to "represent or identify [him]self as a Lieutenant in the Cincinnati Police Division". He admits that his speech and activities have not otherwise been restricted. Both the identification of Thomas as a police officer and the wearing of Thomas' police badge in conjunction with his lobbying is certainly communicative and particularly relevant to his comments in this arena; however, they must be analyzed separately to discern whether Thomas had a "clearly established right" in either area.

The Supreme Court has prescribed the particularized "clearly established" right standard to be:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . ; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (citations omitted).

While it may be clear that a public employee does not forfeit his First Amendment rights entirely when he accepts public employment, "the scope of those rights in any given factual situation has not been well defined."

Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986), *cert. denied*, 479 U.S. 848 (1986). In fact, the Supreme Court has made clear that such rights are not amenable to clear articulation in every factual setting. *Pickering v. Board of Educ.*, 391 U.S. 563, 569 (1968). "The Court was at pains to point out that, in view of the 'enormous variety of fact situations' in which critical statements by public employees may be thought by their superiors to furnish grounds for dismissal, it was 'not appropriate or feasible to attempt to lay down a general standard' for resolving the free speech claims of public employees and that it could only 'indicate some of the general lines along which an analysis of the controlling interests should run'." *Benson*, 786 F.2d at 276 (quoting *Pickering*, 391 U.S. at 569)).

"The Supreme Court has never established a bright-line test for determining when a public employee may be disciplined in response to the employee's speech." *Busby v. City of Orlando*, 931 F.2d 764, 773 (11th Cir. 1991) (citation omitted). In the absence of any "bright-line test" for determining when a public employee may be disciplined in response to the employee's speech, public officials should rarely be denied qualified immunity for taking disciplinary action in response to an employee's speech. *Id.*; *Dartland v. Metro. Dade County*, 866 F.2d 1321 (11th Cir. 1989); *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021 (5th Cir. 1988); *Benson*, 786 F.2d at 276.

In *Dartland*, the United States Court of Appeals for the Eleventh Circuit observed:

> Because of this case-by-case approach, "[t]here will rarely be a basis for [an] *a priori* judgment that the termination or discipline of a public

> employee violated 'clearly established' constitutional rights." *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1988). Because no bright-line standard puts the reasonable public employer on notice of the constitutional violation, the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful.

Dartland, 866 F.2d at 1323.

Similarly, the United States Court of Appeals for the Fifth Circuit has assessed the implications of the case-by-case approach for determining qualified immunity to alleged violations of public employee First Amendment rights. In *Noyola v. Texas Dept. of Human Resources*, the court held:

> One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's first amendment rights. There will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated "clearly established" constitutional rights.

Noyola, 846 F.2d at 1025.

Public officials have been given only general guidelines which the Supreme Court, Courts of Appeals and District Courts apply case-by-case. Each case, therefore, becomes a fact specific inquiry. "[R]easonable government officials, knowing only that they must not infringe on [employee free speech rights], would not necessarily know just what conduct was prohibited." *Id.* at 1025

(citation omitted). "*Pickering* and its sequels stand for the proposition that speech on questions of public interest ought not be deterred too much, or for too little reason, making it almost impossible to formulate bright lines." *Greenberg v. Kmetko*, 922 F.2d 382, 384 (7th Cir. 1991). Consequently, public officials cannot discern clearly established rights of public employee free speech in the context of the *Pickering* balancing approach. "[U]ntil the constitutional right has been stated so that reasonably competent officers would agree on its application to a given set of facts, it has not been 'clearly established'." *Colaizzi*, 812 F.2d at 308. The right of public employees to speak in the context of public employment was not in 1991 or 1992 and is not today stated so that reasonably competent police officials would agree on its application. In this context of shifting interests of free speech and public efficiency, principles of immunity relieve governmental officials from having to decide, at their financial peril, how judges will balance these interests in the years to come. *Greenberg v. Kmetko*, 922 F.2d 382, 385 (7th Cir. 1991).

Even the District Court, in denying Colonel Whalen and Lt. Colonel Ammann qualified immunity, observed that case law had not established any bright lines but resulted in imprecise standards. Such imprecision is exactly why Colonel Whalen and Lt. Colonel Ammann are immune from any personal liability. "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) (citations omitted).

"[T]he test for immunity should be whether the law was clear in relation to the specific facts confronting the

public official when he acted." *Colaizzi*, 812 F.2d at 308. Both Police Chief Lawrence Whalen and Assistant Chief Edward Ammann were confronted with a Lieutenant in the Cincinnati Police Division who willfully abused and exploited his badge, rank, and position in the Cincinnati Police Division for the personal gain of enhancing his credibility. In response, Colonel Whalen and Lt. Colonel Ammann took reasonable administrative action to preclude him from exploiting his badge and/or position in the Police Division while continuing to recognize his right to debate the propriety of gun control legislation.

No court has recognized a right to use or abuse public employment solely for the purpose of enhancing credibility for personal gain. Public employment is not and should not be abused as a soap box from which an employee can enhance credibility for his personal opinion. Instead, reasonable restrictions on the use of public employment to advance personal opinion have been found not to violate any constitutional rights. *Detroit Firefighters Ass'n v. City of Detroit*, 508 F.Supp. 172, 177 (E.D. Mi. 1981).

Clearly, an employee's right to free speech is not and has not been clearly established within the context of qualified immunity. Moreover, a public employee does not enjoy any right to use or exploit his employment to enhance credibility in the debate of public issues. Such imprecision in the standards to determine if a public employee's speech is protected or subject to restriction must lead to the incontrovertible conclusion that the contours of the public employee's right to free speech in the employment setting are not sufficiently clear to a reasonable police official. Accordingly, Thomas' right of free

speech within the context of his employment in the facts of this case was not clearly established when Police Chief Whalen and Lt. Colonel Ammann exercised reasonable administrative supervision over his exploitation of his position in the Cincinnati Police Division.

III. POLICE CHIEF WHALEN AND ASSISTANT CHIEF AMMANN ACTED REASONABLY TO RESPECT GENERALIZED RIGHTS OF FREE SPEECH AND TO PRESERVE THE INTEGRITY, ORDER, EFFICIENCY AND DISCIPLINE OF THE POLICE DIVISION.

Because no bright-line standard had been clearly established to guide police officials in the supervision of subordinates attempting to enhance their personal credibility through the exploitation of their badge, their rank or their employment in the police division, Police Chief Lawrence Whalen and Assistant Chief Edward Ammann are entitled to qualified immunity unless reasonable police officials in their place would necessarily have known that supervision, admonition, evaluation, investigation, and discipline under the circumstances violated Thomas' clearly established right of free speech to use his employment as a soap box. *Busby v. City of Orlando*, 931 F.2d 764, 774 (11th Cir. 1991); *Dartland v. Metro. Dade County*, 866 F.2d 1321, 1324 (11th Cir. 1989). "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent [official] would have [supervised, admonished, investigated, or initiated disciplinary procedure]; but if [officials] of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Colonel Whalen and Lt. Colonel Ammann should not be held to the same standards as judges discerning legal principles and applying such principles to the facts of a case. Government officials should not be expected to become skilled in guessing the future path of the law. *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1980), *cert. denied*, 479 U.S. 848 (1986). "Governmental employees must obey the law in force at the time but need not predict its evolution, need not know that in the fight between broad and narrow readings of a precedent the broad reading will become ascendent." *Greenberg v. Kmetko*, 922 F.2d 382, 385 (7th Cir. 1991). Rather, this Court should inquire if the facts confronting Police Chief Whalen and Assistant Chief Ammann were so compelling in favor of protecting Thomas' right of free speech that police officials of reasonable competence in their position at that time would necessarily know that transferring, supervising, admonishing, ordering, or initiating discipline against him violated his constitutional rights. *Guercio v. Brody*, 911 F.2d 1179 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 114 L.Ed.2d 76, 111 S.Ct. 1681 (1991).

Moreover, the Courts have also recognized and given deference to the need for maintaining a close working relationship in quasi-military organizations like police departments. *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992); *Busby*, 931 F.2d at 774. "Quasi-military organization. . . . generally by necessity must cast regulations in broad terms. . . . Additionally, institutions such as the . . . police have needs 'which must demand a high level of discipline and duty of their members in order to function effectively for the good of all members of society'." *Busby*, 931 F.2d at 774-75 (citation omitted). A police

organization must be given considerable deference to instill discipline and correspondingly restrict its employees. Consequently, the Courts have afforded police officials greater latitude in dealing with subordinates within the ranks. *Maciariello v. Sumner*, 973 F.2d at 300. The Police Chief and the Assistant Police Chief, therefore, have a special interest in maintaining loyalty, discipline, and in general, the reputation of the Police Division.

Both Police Chief Whalen and Assistant Chief Ammann have supervised, admonished, directed, and ordered Thomas to achieve a purpose unrelated to the suppression of his rights of free speech – namely, avoiding any appearance of impropriety which would cast doubt upon the integrity of the Division.[5] Avoiding the appearance of impropriety serves the integrity and efficiency of the Cincinnati Police Division. Preventing the erosion of public competence in the integrity of the police service is a compelling governmental interest. *Keefe v. Library of Congress*, 777 F.2d 1573, 1580-81 (D.C. Cir. 1985).[6]

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[5] Certain supervisory/administrative acts are unrelated to any exploitation of Thomas' badge, rank or position in the Police Division. Instead, these decisions were made in the regular course of administering the Cincinnati Police Division. Certainly a routine transfer along with other lieutenants has nothing to do with personal advocacy. A denial of a request to cancel a parking ticket received while off-duty cannot reasonably be construed to violate clearly established rights of free speech. A tactical decision to deploy SWAT cannot possibly be subjected to scrutiny for remote implications of free speech.

[6] Contrary to the opinion of the learned District Court judge, the Police Chief and the Assistant Police Chief need not

Thomas received a written reprimand not because of what he may have said or where he may have said it, instead, he was reprimanded because he used his badge, at the request of the NRA, to enhance his own credibility at a press conference. Police Chief Whalen requested answers to specific questions about a publication in which Thomas used his rank and association with the Police Division to enhance his own credibility. The Police Division initiated disciplinary action against him for misleading the court in the statement of his qualifications. Chief Whalen and Assistant Chief Ammann initiated these directives or admonitions to Thomas in order to avoid any appearance of impropriety by a ranking officer in the Cincinnati Police Division. The Police Division cannot tolerate its officers using their position for personal gain. Such an interest has been found to be a compelling justification for limiting a public employee's rights under the First Amendment. As the Court held in *Keefe v. Library of Congress*: ". . . it is inescapable that some off-duty activities of a public servant are incompatible with the undivided loyalty and integrity that [such a] person must show. . . . " *Id.* at 1580.

The Court of Appeals for the District of Columbia has found an administrative regulation prohibiting attendance at political conventions to be constitutionally permissible. *Id.* In *Keefe*, a Congressional Research Service

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prove that Thomas' conduct actually disrupted efficiency in the Police Division, "but only that an adverse effect was 'reasonably to be apprehended.' " *Maciariello v. Sumner*, 973 F.2d 295, 300 (7th Cir. 1992) (citations omitted).

("CRS") Analyst challenged a conflict of interest regulation which precluded off-duty attendance at political conventions. In upholding the constitutionality of the regulation, the Court found that nonpartisanship on the part of CRS Analysts enables them to serve all members of Congress effectively and to carry out Congress' mandate that the Service render advice without partisan bias. *Id.* at 1580-81. "Avoiding political activities may also prevent erosion of congressional and public confidence in the integrity of the Service." *Id.* at 1581.

Upholding the integrity and public confidence of the Cincinnati Police Division are similar compelling interests motivating the administration, supervision, admonition and discipline of this lieutenant. Police Chief Whalen and Assistant Chief Ammann diligently sought to preclude the unwarranted entanglement of the Cincinnati Police Division in NRA activities. Lt. Colonel Ammann issued prudent administrative guidelines to assure that the Police Division was not perceived as opposing reasonable gun ownership laws. The Police Administration initiated reasonable and limited administrative action to preclude exploitation of the Police Division for personal advocacy. Finally, the Police Chief and the Assistant Chief made routine administrative decisions unrelated to Thomas' personal opinions or his use of employment as a soap box for those opinions. A rotational transfer, a refusal to cancel a parking citation, and the marshalling of SWAT are objectively reasonable supervisory decisions. Certainly, neither this Court nor any court expects competent police supervision to shirk responsibility in order to avoid allegations of constitutional deprivations.

A reasonable police official would conclude that Thomas flagrantly entangled the Cincinnati Police Division in the partisan debate over gun ownership legislation. In particular, the Cincinnati Police Division could have been viewed as supporting or endorsing the NRA. Thomas' continual flaunting of police procedure could reasonably be found to demonstrate disloyalty, undermine discipline within the Police Division and generate unfavorable publicity for the Police Division. As a lieutenant responsible for the supervision of a shift in a district, Thomas would be expected to be an example for the officers assigned. Yet his example is one of flaunting police policy and exploitation of the division for personal gain. Certainly, no competent police chief would permit the department to be used as a soap box for the personal gain of a subordinate. Considering the reasonable interests in maintaining loyalty, discipline and a favorable reputation with the public, a police official could reasonably conclude that appropriate administrative, supervisory and disciplinary action was necessary. Accordingly, a reasonable police official in like circumstances to Police Chief Lawrence Whalen and Assistant Chief Edward Ammann could reasonably believe that administrative and disciplinary action in response to Thomas' exploitative and manipulative conduct was lawful and appropriate. Therefore, both Police Chief Lawrence Whalen and Assistant Chief Edward Ammann are entitled to qualified immunity.

REASONS WHY THE PETITION SHOULD BE DENIED

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, a review of a petition for a writ of certiorari is not a matter of right, but of judicial discretion. No special or important reasons exist in this case warranting the granting of a writ of certiorari. First, petitioner has not, nor can he, assert that a conflict exists on this issue between United States Courts of Appeals. Moreover, a conflict does not exist on this issue between state courts of last resort and a United States Court of Appeals or other state courts of last resort. Finally, for the reasons stated in the Summary of the Argument, the Sixth Circuit Court of Appeals did not render a decision that conflicted with applicable decisions of this Court. Therefore, this Court in its discretion should deny the petitioner a writ of certiorari pursuant to Rule 10.

CONCLUSION

Neither Chief Whalen nor Assistant Chief Ammann violated any clearly established rights. Both Colonel Whalen and Lt. Colonel Ammann reasonably and competently supervised, admonished and ordered a subordinate officer without any impact upon his right to free speech. Accordingly, Chief Whalen and Assistant Chief Ammann are entitled to qualified immunity.

Although Thomas may not be required to conceal his employment as a police officer, his right to speak as a member of the Cincinnati Police Division is not clearly established when evaluated under the balancing test set out in *Rankin v. McPherson*, 483 U.S. at 384-85. The extra

margin of credibility lent his cause by exploiting his affiliation does not outweigh the Cincinnati Police Division's interest in preserving the appearance of impartiality in areas closely related to its core mission.

The Sixth Circuit Court of Appeals found that Whalen and Ammann did nothing to interfere with Thomas' ability to communicate his pro-gun message; their actions were designed simply to disassociate the Cincinnati Police Division from that message. Thomas has not been penalized in any appreciable way even when called to task: his career has not been set back, his salary remains the same, and he concedes that he continues his First Amendment activities. Because Thomas' right to involve the Division in his NRA advocacy is not clearly established by the proof, a burden that fell on Thomas, defendants Whalen and Ammann were correctly entitled to qualified immunity as a matter of law.

For all of the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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